Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

AMMEX, INC.,

Petitioner,

v.

STATE OF MICHIGAN, DEPARTMENT OF TREASURY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Michigan

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal statutes and regulations that prescribe comprehensive standards for duty-free stores, a class of Customs bonded warehouse, preempt state taxes of motor fuel sold on a duty-free basis.

2. Whether motor fuel sold on a duty-free basis under federal law is an export for purposes of the Import-Export Clause of the U.S. Constitution and hence protected from taxation by the states.

LIST OF PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding below are identified in the caption of this Petition.

RULE 29.6 STATEMENT

Petitioner Ammex, Inc. has no parent, and no publicly held company owns any of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ammex, Inc. ("Ammex") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Michigan entered on September 14, 1999.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals of Michigan is reported at 237 Mich. App. 455 and 603 N.W.2d 308 and is reproduced in the Appendix ("App.") at 1a to 12a. The unpublished order of Supreme Court of Michigan denying Petitioner's application for leave to appeal is reproduced at 13a. The unpublished order of the Supreme Court of Michigan denying Petitioner's motion for reconsideration is reproduced at 14a. The unpublished opinion of the Michigan Court of Claims is reproduced at 15a to 20a.

JURISDICTION

The decision of the Michigan Court of Appeals was entered on September 14, 1999, and that court denied Ammex's motion for rehearing on November 23, 1999. On September 27, 2000, the Supreme Court of Michigan denied Ammex's timely application for leave to appeal and, on February 26, 2001, denied Ammex's motion for reconsideration. On May 9, 2001, Justice Stevens entered an order granting Ammex an extension of time within which to file this petition to and including June 26, 2001. This Court's jurisdiction lies under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Commerce Clause, the Import-Export Clause, and the Supremacy Clause of the Constitution, which provide in relevant part:

> The Congress shall have power...[t]o regulate Commerce with foreign Nations ....

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause).

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws ....

U.S. Const. art. I, § 10, cl. 2 (Import-Export Clause).

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ....

U.S. Const. art. VI, cl. 2 (Supremacy Clause). In addition, this case involves the following statutes, relevant portions of which are set out verbatim in the Appendix:

Omnibus Trade and Competitiveness Act of 1988 § 1908, Pub. L. No. 100-418, 102 Stat. 1107, 1315 (codified at 19 U.S.C. § 1555(b)). App. at 21a to 28a.

Michigan Sales Tax Act, Mich. Comp. Laws §§ 205.51, *et seq.* App. at 29a to 37a.

Michigan Motor Fuel Tax Act, Mich. Compl. Laws §§ 207.101, *et seq.* App. at 38a to 48a.

STATEMENT OF THE CASE

This case presents the question of whether a state may impose motor fuel and sales taxes on gasoline and diesel fuel sold for export on a duty-free basis from a U.S. Customs Class 9 bonded warehouse and duty-free store. The state courts below concluded that such taxes were not barred by the preemptive force of the federal duty-free regulatory scheme, the Import-Export Clause, U.S. Const. art. 1, § 10,

cl. 2, or the Commerce Clause, *id.* art. 1, § 8, cl. 3. Because the decision below conflicts with federal law governing the operations of duty-free establishments and the handling of goods exported from the United States, the Court should grant the petition and reverse the judgment below.

A. The Nature and Regulation of Duty-Free Stores

Duty-free stores, which can be found at all airports with direct flights outside the U.S. and at most border crossings, are created, authorized and regulated by the federal government. More specifically, these federal enclaves are a class of U.S. Customs Service bonded warehouse (Class 9). 19 C.F.R. § 19.1(a)(9).

In general, Customs bonded warehouses are authorized to receive imported merchandise upon which no duties have been paid and hold such merchandise for up to five years pending re-export. As this Court explained:

> Pursuant to its powers under the Commerce Clause, Congress established a comprehensive customs system which includes provisions for government supervised bonded warehouses where imports may be stored duty-free for prescribed periods. At any time during that period the goods may be withdrawn and reexported without payment of duty. Only if the goods are withdrawn for domestic sale or stored beyond the prescribed period does any duty become due.

Xerox Corp. v. County of Harris, 459 U.S. 145, 151 (1982) (citations omitted). Similarly, this Court recognized Customs bonded warehouses as "federal enclaves free of state taxation" with respect to goods destined for export. *Id.*, 459 U.S. at 154 (citation omitted).

"Government regulated, bonded warehouses have been a link in the chain of foreign commerce since 'a very early period in our history.'" *Id.* (quoting *Fabbri v. Murphy*, 95 U.S. 191, 197 (1877)). As early as 1846, when customs duties represented approximately 90 percent of all federal revenues, Congress determined to waive or defer collection of duties on imports destined for re-exportation in order to encourage the use of American ports. *Id.* at 151 & n.7. Congress has continued the historical role of Customs bonded warehouses ever since, and for many years they have been regulated under Part IV of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1551-1565.

Prior to 1988, however, no federal statute specifically regulated duty-free stores, as opposed to bonded warehouses in general; instead, the Customs Service regulated the establishment and operation of duty-free stores through administrative directives. *Duty Free Int'l, Inc. v. United States*, 17 C.I.T. 1425, 1426 (1993). In 1984 Congress, sensing the need for a comprehensive statutory framework, prohibited appropriation of funds for the regulation of duty-free stores until it had enacted a statutory scheme. *See Duty Free Int'l, Inc. v. United States*, 16 C.I.T. 163, 165 (1992) (citing Continuing Appropriations for Fiscal Year 1985, Pub. L. No. 98-473, 98 Stat. 1837, 1967 (1984)).

As part of the of the Omnibus Trade and Competitiveness Act of 1988, Congress created the first federal statute explicitly regulating duty-free stores.[1] That statute prescribes the conditions under which "[d]uty-free sales enterprises may sell and deliver for export from the customs territory duty-free merchandise." 19 U.S.C. § 1555(b)(1). It also granted

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[1] Omnibus Trade and Competitiveness Act of 1988 (the "Omnibus Act") § 1908, Pub. L. No. 100-418, 102 Stat. 1107, 1315 (codified at 19 U.S.C. § 1555(b)).

the Secretary of the Treasury authority to promulgate regulations governing the operation of duty-free sales enterprises. *Id.* These regulations appear at 19 C.F.R. §§ 19.35 to 19.40.

B. Petitioner's Status and Operations

Pursuant to federal authorization, Ammex operates a U.S. Customs Class 9 bonded warehouse and duty-free store adjacent to the Ambassador Bridge connecting the United States and Canada. Ammex's facility is located within the U.S. Port Authority's area at the Ambassador Bridge. This facility is gated, fenced, guarded and regulated by the Customs Service, and beyond the point of no return to the United States.

As a "duty-free sales enterprise," Ammex is permitted to sell all legal products "duty-free" to customers who transport those goods directly to Canada after leaving Ammex's store. *See* 19 U.S.C. § 1555(b)(6)(B)(8)(D). Ammex conducts "sterile" sales operations, *i.e.*, all goods sold by Ammex must be exported to Canada. The roads leading to and from Ammex's duty-free store are privately owned. Customers leaving Ammex's duty-free store are required to drive over privately-owned roads to the Ambassador Bridge (which is also privately owned) and into Canada; customers leaving Ammex's duty-free store are not permitted to remain in the United States.

Accordingly, no duty-free goods sold by Ammex may pass from the Ammex store to the United States for domestic consumption unless they are first exported to Canada and then, only if their owner chooses to return to the United States with them, and is permitted to do so by Canadian law, and U.S. Customs law. Such goods must be declared by their owners as imported goods upon any return to the U.S. Duty-free goods sold at the Ammex store include, for example:

(a) Tobacco products that are stamped with clear indicia that they are sold for export only and are not

subject to any state regulations or taxes including cigarette taxes;

(b) Alcohol products that are purchased duty and tax free from manufacturers and are not purchased from the Michigan Liquor Control Board or under the regulation or tax domain of any Michigan law or agency;

(c) Durable and nondurable goods, such as perfume and watches, that are sold solely for export and accounted for, inventoried and sold pursuant to U.S. Customs regulations.

Ammex also sells gasoline and diesel motor fuel for automobiles and to commercial tractors and trailers whose operators have fuel accounts with Ammex. Those automobiles, tractors and trailers are required to cross the border into Canada after making such a purchase. Ammex sells this fuel on a duty-free basis as a result of the decision of the Court of International Trade ("CIT") in *Ammex, Inc. v. United States*, 116 F. Supp. 2d 1269, 1275-76 (Ct. Int'l Trade 2000), which held that the fuel has all the necessary characteristics of a product that may be sold from a duty-free store for export from the United States.

C. The Taxes at Issue

The Michigan Sales Tax Act, Mich. Comp. Laws §§ 205.51, *et seq.*, imposes a tax upon retail sales equal to 6 percent of the gross proceeds of such sales.[2] With respect to gasoline, the Sales Tax Act mandates pre-payment of the tax by the purchaser of gasoline at the time of purchase or shipment from a supplier.

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[2] Excerpts from the Michigan Sales Tax are reproduced in the Appendix at 29a to 37a.

The gasoline and diesel motor fuel taxes are imposed pursuant to the Motor Fuel Tax Act, Mich. Compl. Laws §§ 207.101, *et seq.*[3] In general, this tax is imposed upon all gasoline and diesel fuel sold or used in propelling motor vehicles upon the public roads and highways in Michigan. *Id.* § 207.102. Suppliers who sell or distribute motor fuel are required to collect the tax from the purchaser for payment to the state.

During the period January 1, 1994 to December 31, 1996, Ammex paid under protest both motor fuel and sales taxes on its gasoline and diesel sales. Since at least 1986, no attempt was made by the state of Michigan to assess state taxes on any of Ammex's other duty-free sales. Subsequent to issuance of the decision below, however, Michigan's Treasury Department notified Ammex of its intent to issue a general sales tax assessment on the sale of all duty-free goods sold by Ammex for the period January 1997 through December 2000, as well as a tobacco products tax assessment on the sale of duty-free tobacco products for that same period. Similarly, Michigan has informed other duty-free stores operating in the state of an intent to impose the general sales tax and tobacco products taxes on their duty-free sales.

D. Proceedings Below

This case originated as a series of administrative proceedings before the Michigan Treasury Department, in which Ammex sought and was denied refunds of previously paid sales, gasoline, and diesel taxes. In July 1996, Ammex sought review of the Treasury Department's action in the Michigan Court of Claims pursuant to Mich. Comp. Laws § 205.22(1)-(2).

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[3] Excerpts from the Motor Fuel Tax Act are reproduced in the Appendix at 38a to 48a.

Ammex challenged the Department's rulings on a number of grounds, including the following:

> By assessing taxes on Plaintiff-Appellant AMMEX as specified [above], the Michigan Department of Treasury has without the consent of Congress laid an impost or duty on exports and has accordingly violated the Import-Export Clause of the United States Constitution.
>
> . . . .
>
> By assessing taxes on Plaintiff-Appellant AMMEX as specified [above] on the motor fuels in the stream of exportation, the Michigan Department of Treasury has violated the Foreign Commerce Clause, in that it is regulating commerce with foreign nations.
>
> . . . .
>
> By assessing the taxes specified [above] on Plaintiff-Appellant AMMEX, the Michigan Department of Treasury has violated the Supremacy Clause, in that the operations of Plaintiff-Appellant AMMEX, in operating a duty-free enterprise, are subject to the regulation of the federal government and the United States Customs Service, which has fully filled the regulatory field and made the imposition of state taxes unlawful.

First Supp. Compl. ¶¶ 49, 53, 57.

The case was submitted to the Michigan Court of Claims on stipulated facts. On August 20, 1997, the Court of Claims issued its opinion rejecting all of Ammex's arguments, including its constitutional challenges, and upholding the rulings of the Michigan Department of Treasury. *See* App. at 15a to 20a. Following a round of unsuccessful post-trial motions, Ammex appealed as of right to the Court of Appeals of Michigan. *See* Mich. Comp. Laws § 7.203(A)(1).

In its appeal, Ammex again pressed its arguments that the taxes at issue were preempted by federal Customs regulations and improper under both the Import-Export Clause and the Commerce Clause of the U.S. Constitution. *See* Brief of Appellant, Ammex, Inc. at 19-35. The Court of Appeals' decision affirming the judgment of the Court of Clams was issued on September 14, 1999. The appellate court failed to address the preemption issue and agreed with the lower court that Michigan's sales and motor fuel taxes did not violate either the Import-Export Clause or the Commerce Clause. *See* App. at 3a-10a.

The court's analysis under the Import-Export Clause turned on whether the fuel was an "export." The Court acknowledged that in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946), this Court had held that "the imposition of a nondiscriminatory sales tax on the sale of oil intended for exportation ... ran afoul of the Import-Export Clause." App. at 4a. Although *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), had introduced a policy-based analysis, *Richfield Oil* had never been overruled, and "we must conclude that *Richfield Oil*, has precedential value." *Id.* at 5a.

The court concluded that Michigan's taxes passed muster under *Richfield Oil* because they were not direct taxes on exports for purposes of the Import-Export Clause. App. at 7a. Ignoring both the export status of the goods as a matter of federal law and the certainty of export resulting from the customers' mandatory route of travel, the court based its conclusion on the assumption that a portion of the motor fuel purchased at Ammex's duty-free facility would be consumed in Michigan – in propelling motor vehicles over less than two miles of private road and across the Ambassador Bridge into Canada. *Id.* The court arrived at its conclusion in the face of the parties' stipulation that "All goods sold by AMMEX to

its customers must be exported from the United States." Stip. ¶ 17; *Ammex*, App. 7a n.2.

"For much the same reason," the court also concluded that Michigan's taxes were not "imposts" or "duties" under *Michelin Tire*. *Id.* at 7a. In *Michelin Tire*, the Court held that state exactions which prevent the federal government from speaking with one voice in regulating commercial relations with foreign governments are "imposts" or "duties" for purposes of the Import-Export Clause. 423 U.S. at 285. In this case, however, the court below reasoned that "because the economic burden of the challenged taxes fell directly on end-use consumers purchasing fuel in the United States for immediate consumption, the taxes cannot be said to have affected the foreign policy of the United States." *Id.* Accordingly, the court of appeals held that Ammex "is not entitled to relief under the Import-Export Clause." *Id.* at 8a.

The state court believed that Michigan's taxes did not violate the Commerce Clause for the same reason. Like the Import-Export Clause under *Michelin* analysis, the Commerce Clause prohibits state taxes that undercut the federal government's ability to "speak with one voice" in matters of foreign commerce. *Japan Line Ltd. v. Los Angeles Co.*, 441 U.S. 434, 451 (1979). "[T]he taxes at issue here," the court explained, "cannot be said to have affected the foreign policy of the United States because the economic burden of the taxes fell directly on end-use consumers purchasing fuel for immediate consumption in discrete transactions occurring entirely within the United States." App. at 9a-10a.

Ammex applied to the Supreme Court of Michigan for leave to appeal. In its submissions in support of its application, Ammex once again argued that Michigan's taxes are preempted by federal law and are invalid under the Import-Export and Commerce Clauses as taxes on exports. *See* Plaintiff-Appellant Ammex, Inc.'s Brief in Support of its Application for Leave to Appeal at 3-7, 11-12 (filed Dec. 14,

1999); Plaintiff-Appellant Ammex, Inc.'s Reply in Support of its Application for Leave to Appeal at 3-16 (filed Aug. 8, 2000).

On August 25, 2000, after briefing on Ammex's appeal application had been completed, the Court of International Trade issued its decision in *Ammex v. United States*, 116 F. Supp. 2d 1269. That decision was the culmination of litigation instigated in January 1999 by Ammex against the U.S. Customs Service challenging Customs's denial of duty-free status to Ammex's sales of motor fuel. The Court of International Trade expressly held that Customs's ruling on this matter was contrary to law, since Ammex's motor fuel was eligible for duty-free sale because it statutorily qualifies as merchandise that can be "entered and withdrawn (for exportation) from bonded warehouses, such as duty-free stores." *Ammex*, 116 F. Supp. 2d at 1272. The CIT decision necessarily reflected a conclusion that as a matter of law these goods cannot be subjected to federal duties because they are being sold for export from the United States, and, accordingly, the Customs Service subsequently authorized Ammex to sell motor fuel on a duty-free basis.

Ammex brought this decision to the attention of the Michigan Supreme Court in a supplemental submission filed on August 30, 2000. The Supreme Court denied Ammex's application for leave to appeal on September 27, 2000. In seeking reconsideration of that ruling, Ammex again stressed the conflict between state and federal law represented by the decision of the Michigan Court of Appeals and that of the federal Court of International Trade. The Michigan Supreme Court, with one justice dissenting, denied Ammex's motion for reconsideration on February 26, 2001.

REASONS FOR GRANTING THE PETITION

This petition presents a significant issue of constitutional dimensions: can a state impose a tax on a duty-free product sold by a federally authorized duty-free sales enterprise where the product, as a matter of federal law, is an export. This broad issue implicates the Supremacy Clause, the Import-Export Clause, and the Commerce Clause.

Constitutional history and text, as well as this Court's precedent, affirm that foreign commerce has been long regarded as an area of exclusive federal concern. Customs bonded warehouses, especially duty-free sales enterprises, are federal enclaves created, authorized and regulated by federal law. Every aspect of Ammex's operations as a duty-free sales enterprise is regulated by the federal government in the exercise of its exclusive power to regulate foreign commerce. This comprehensive federal regulatory scheme occupies the field of duty-free stores, leaving no room for state imposition of taxes such as those at issue in this case. Any other construction will undermine the uniformity of federal standards and risk the balkanization and subversion of the federal scheme of regulation of intrinsically federal enclaves. Given the important and competing state and federal interests at stake here, consideration of the issue by this Court is appropriate. Indeed, the preemptive force of the federal duty-free scheme on state taxes is an issue with broad implications for the many duty-free stores located throughout the nation.

This case provides a particularly good vehicle for examining that question because the Court of International Trade has squarely held that sales of motor fuel from Petitioner's store qualify as duty-free exports for purposes of federal law. As the Michigan courts have refused to give any weight to that decision, to the paramount federal regulation of duty-free stores, or to the comprehensive framework of federal statutes and regulations, this petition presents an irreconcilable con-

flict that only this Court can resolve. By definition under federal law, Ammex's sales of motor fuel occur in export transit. Yet the courts below labeled such sales as ordinary domestic transactions. The supremacy of federal law and the need for uniformity in matters of foreign commerce mandate consistent adherence to the federal concept of "export" for purposes of constitutional analysis. To this extent, at the very least, federal law defining sales from a duty-free store as "exports" must supersede the views of the states.

The constitutional prohibition on state taxation of goods in export transit was recognized long ago in *Richfield Oil v. State Board of Equalization*, 329 U.S. 69 (1946), and remains sound under the "modern approach" to Import-Export Clause analysis prescribed in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). This Court has "never upheld a tax assessed directly on goods in import or export transit" under the Import-Export Clause. *United States v. IBM Corp.*, 517 U.S. 843, 862 (1996). The Michigan Court of Appeals, however, did just that.

Because Michigan's sales and motor fuel taxes as applied to sales from Ammex's duty-free store fall directly on exports in transit, they are invalid under the Import-Export Clause. Indeed, there is no precedent to support the state taxation of duty-free goods sold by a duty-free sales enterprise. If this Court allows Michigan to succeed in its approach under the guise of the rationale employed by the state court – that the duty-free motor fuel sold at Ammex's Customs Class 9 bonded warehouse to customers bound for Canada is not an export – the states are likely to attempt wholesale taxation of duty-free sales – a result squarely prohibited by the Import-Export Clause.

I. FEDERAL LAW REGULATING DUTY-FREE STORES PREEMPTS MICHIGAN'S SALES AND MOTOR FUEL TAXES

The Michigan courts failed to recognize the primacy of federal law with respect to Ammex's operation as a duty-free sales enterprise. The Congress of the United States, acting pursuant to clearly enumerated powers placed in its charge by the Constitution, has actively asserted its authority to promulgate standards for duty-free stores engaged in foreign commerce. The federal scheme of regulation of such Customs bonded warehouses is intended to address and encompass all such regulation and to be exclusive.

A scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for supplemental state regulation. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). This "field preemption" occurs where the "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 713 (1985). This is particularly so when a state regulates in an area where there has been a history of significant federal presence. *See, e.g., United States v. Locke*, 529 U.S. 89, 108 (2000). Moreover, the Commerce Clause, even when dormant, restricts the states' authority to regulate matters of foreign commerce. *See Japan Line*, 441 U.S. at 449. When the federal government has exercised its power to regulate foreign commerce, the states must abstain altogether.

Thus, long before passage of the Omnibus Act, which specifically regulates duty-free stores, this Court held that the Tariff Act of 1930 was an exercise of the federal government's power to regulate foreign commerce and that it preempted state taxes on imported oil held in a bonded warehouse. *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940); *see also Xerox Corp.*, 459 U.S. 154 (imposition of nondis-

criminatory ad valorem personal property taxes on imported goods stored under bond in customs warehouse and destined for foreign markets was preempted by the Tariff Act of 1930); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (New York may not, in the face of the Commerce Clause and the Tariff Act of 1930, regulate sales of liquor at a duty-free facility operating at Kennedy Airport).

The states' authority in this area can only have been further diminished upon passage of the Omnibus Act. In that statute, after a congressionally directed moratorium on regulatory changes lasting for some three years, Congress adopted a comprehensive scheme of regulation for stores selling on a duty-free basis to the public. The federal government regulates every aspect of the operation of Ammex's duty-free sales enterprise. The federal government regulates: (1) the establishment of duty-free sales enterprises; (2) permissible locations of duty-free sales enterprises; (3) procedures that a duty-free store must establish "to provide reasonable assurance that duty-free merchandise sold by the enterprise will be exported from the customs territory"; (4) quantities of merchandise that may be sold by a duty-free store; (5) circumstances under which the operator of a duty-free store may unpack merchandise into saleable units; (6) procedures that a duty-free store must adopt in delivering duty-free merchandise to its customers; (7) notice that a duty-free store must provide to customers; (8) the extent to which a duty-free store may also sell merchandise other than duty-free goods; and (9) inventory and recordkeeping requirements for duty-free sales enterprises.[4] Indeed, the United

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[4] *See* 19 U.S.C. § 1555(b); 19 C.F.R. §§ 19.35, 19.36. In addition, Congress has explicitly regulated the notices that must be posted by duty-free stores concerning (1) the duty- and tax-free character of its goods, (2) the declaration obligations of any person bringing duty-

(Continued ...)

States Court of International Trade has recognized that Congress has enacted a "comprehensive statutory framework" for duty-free sales enterprises. *Duty Free Int'l*, 16 C.I.T. at 165.

The Omibus Act allows participation of local governments only in connection with the potential "concession or other form of approval" that might be required as an incident of operation of a duty-free sales enterprise. 19 U.S.C. § 1555(b)(4).[5] Because such participation is specifically authorized, this provision indicates that Congress intended to preclude other forms of state regulation. Thus, in the Omnibus Act Congress expressly – and severely – limited the scope of state jurisdiction over duty-free sales enterprises, and did so in a way that proscribes the imposition of Michigan's taxes on motor fuels sold by Ammex.

The comprehensive nature of federal regulation is underscored by congressional findings set forth in the Omnibus Act. Congress identified four reasons underlying its regulation of duty-free stores, two of which are particularly germane here. First, Congress determined that "duty-free sales enterprises play a significant role in attracting international passengers to the United States and thereby their operations favorably affect our balance of payments."[6] Second, Congress determined that "*there is a need to encourage uniformity and consistency of regulation of duty-free sales enterprises.*"[7] The Court of International Trade has held that by

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free goods back into the customs territory, and (3) the applicability of the customs laws of the foreign country into which the goods are transported. *See* 19 U.S.C. § 1555(b)(3)(C).

[5] *E.g.*, a building permit or a food handler's license.

[6] *See* Omnibus Act § 1908(a), Pub. L. No. 100-418, 102 Stat. 1107, 1315.

[7] *Id.* (emphasis added).

initially prohibiting Customs's regulation of duty-free stores, and by then enacting a comprehensive regulatory framework for those enterprises, Congress's dominant purpose was to "foster the prosperous growth of duty-free sales enterprises by encourag[ing] uniformity and consistency of regulation of duty-free sales enterprises." *Duty Free Int'l*, 16 C.I.T. at 165 (internal quotation omitted) (alteration in original). These congressional objectives are inconsistent with state taxation.

When it comes to foreign commerce, this Court has acknowledged "the special need for federal uniformity." *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 447 U.S. 1, 8 (1986). That uniformity has been established here by federal statute. Allowing individual states to disrupt this uniform regulatory scheme carries the risk that a conflicting patchwork of state laws will impede the free flow of foreign commerce. This case presents the Court with the opportunity to ensure that states do not encroach on the federal uniformity inherent in Congress's creation and regulation of duty-free stores.

Congress's determination to establish a comprehensive regulatory scheme governing duty-free stores is understandable in light of their prevalence in this country. The U.S. Customs Service regulates hundreds of duty-free facilities at every international airport and major land border crossing in the United States and its territories. Thus, congressional concern for uniformity in this area was well-placed, and Congress's decision to occupy the field must be repected.

II. THIS COURT SHOULD DECIDE WHETHER § 1908 OF THE OMNIBUS ACT DEFINES "EXPORT" FOR PURPOSES OF THE IMPORT-EXPORT CLAUSE

The court below, without even discussing the federal regulatory scheme governing duty-free operations, held that the motor fuel sold at Ammex's duty-free facility was not an

export. That conclusion was central to the court's rulings upholding those taxes under both the Import-Export Clause and the Commerce Clause. *See* App. at 7a, 9a-10a. Under the Tariff Act of 1930, however, merchandise sold from a duty free store is necessarily immediately transferred out of the U.S. and is therefore, by definition, an export. *See* 19 U.S.C. § 1555(b). Indeed, the CIT expressly held that the motor fuel sold by Ammex qualifies for duty free status because such goods are "entered and withdrawn (*for exportation*) from bonded warehouses, such as duty-free stores." *Ammex*, 116 F. Supp. 2d at 1272 (emphasis added). This case, therefore, provides an opportunity for this Court to decide whether an item that qualifies as an export under a federal statute must be treated as an export for purposes of the Import-Export Clause.

The Import-Export Clause provides: "No State shall ... lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing it's inspection Laws ...." U.S. Const. art. I, § 10, cl.2. Whatever the outer boundaries on the protections afforded by this command may be, state taxes on exports are forbidden: "The Court has never upheld a state tax assessed directly on goods in import or export transit." *United States v. IBM*, 517 U.S. 843, 862 (1996). Indeed, this Court's precedents establish that the Import-Export Clause absolutely bans state taxes on imports and exports, whether or not they are discriminatory.

In *Richfield Oil*, the Court explained that the language and history of the Import-Export Clause compelled the conclusion that state taxes imposed directly on exports are invalid *per se*. *See* 329 U.S. at 76-77. In this respect, the Court noted, the Import-Export Clause was more restrictive than the dormant Commerce Clause, which tolerates some nondiscriminatory state taxes on instrumentalities of interstate or foreign commerce. *Id.* at 75-76; *see also Japan Line*, 441 U.S. at 451. The *Richfield Oil* Court concluded that oil that

had been delivered into a ship's hold for immediate transshipment abroad was an export because it had entered the stream of export commerce and thus could not be taxed by the state of California. 329 U.S. at 82-83; *accord Collis v. Bay City Export Lumber Co.*, 70 So. 2d 273 (Ala. 1954); *McDonnell Douglas Corp. v. State Bd. of Equalization*, 13 Cal. Rptr. 2d 399 (Cal. Ct. App. 1992), *review denied* (Cal. Feb. 11, 1993), *cert. denied*, 510 U.S. 814 (1993); *City of Tacoma v. General Metals of Tacoma, Inc.*, 527 P.2d 1314 (Wash. 1974) (*en banc*).

The motor fuel sold duty-free at Ammex's Ambassador Bridge facility is an export in transit under federal law. The Customs laws require all Ammex sales, including its sales of motor fuel, to occur in the stream of exportation from the United States. Ammex is authorized by the United States Customs Service to operate a duty-free sales enterprise, which by definition involves the sale of merchandise, in export commerce, free of duties and taxes. *See* 19 U.S.C. § 1555(b)(1); 19 C.F.R. §§ 19.35 *et seq.* Indeed, Congress has mandated that duty-free sales enterprises must establish procedures to ensure that merchandise sold by the enterprises "will be exported" and that duty-free merchandise must be delivered to customers "for exportation." 19 U.S.C. § 1555(b)(3)(A) and (F). Moreover, merchandise purchased at a duty-free store by a United States resident is treated, upon the resident's return to the United States, as "an article acquired abroad as an incident of the journey from which the resident is returning" for purposes of determining eligibility for a exemption from duty. 19 U.S.C. § 1555(b)(5)(B).[8] As

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[8] *See also United States v. Commodities Export Co.*, 733 F. Supp. 109, 114 (Ct. Int'l Trade 1990) ("The unique nature of a duty-free store is that it sells goods for immediate export from the United States so that its customers need not pay Federal duties and taxes on the goods."); *Ammex Warehouse Co. of San Ysidro, Inc. v. California*,

(Continued ...)

a matter of federal law, then, merchandise sold at a duty-free store must be exported and treated as export commerce.[9]

Because a product may be sold from a duty-free store only if it is immediately exported from the customs territory, a product that is sold from a duty-free store, such as Ammex's motor fuel, is necessarily an export as a matter of federal law. 19 U.S.C. § 1555(b). In evaluating the validity of Michigan's taxes under the Import-Export and Commerce Clauses of the U.S. Constitution, however, the Michigan Court of Appeals substituted its own view of export status for that compelled by federal law. That approach is intolerable, as it subjects the law of exports, which is quintessentially federal in nature, to varying and perhaps, as in this case, conflicting state law rules.

This case presents a particularly dramatic example of a clash between federal and state law with respect to export status. The Court of International Trade has squarely held that the fuel at issue here may be sold as duty-free merchandise from a duty-free store, which necessarily requires exportation. Yet the Michigan Court of Appeals held that the same product is not an export for purposes of a state tax. Where Congress has identified a class of goods that it has deter-

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224 F. Supp. 546 (S.D. Cal. 1963) (holding that with respect to liquor to be sold under bond at a border crossing, "the purchaser has only the physical custody of the liquor and ... the legal possession of the liquor remains in the Customs agent until the moment the purchaser crosses the border"), *aff'd*, 378 U.S. 124 (1964).

[9] Nor is there any question in this case that the motor fuel sold by Ammex was in fact immediately exported to Canada. The parties' stipulations establish that "[i]t is not possible for the vehicles into which gasoline and diesel fuel is dispensed at ... AMMEX ... to then travel over any public roads or highways of the State of Michigan ... because such vehicles must exit the US into Canada." (Stip. ¶ 20).

mined to exempt from duties, it surely intended that those goods be protected from state taxation as well.

The state court's application of the policy-based analytical framework established in *Michelin Tire*, 423 U.S. 276, is erroneous for the same reason. As noted above, the court upheld the state taxes under *Michelin Tire* on the ground that the motor fuel at issue is not an export. *See* App. at 7a-8a. Congress's "one voice," however, has stated otherwise. State taxes on such motor fuel therefore are invalid under *Michelin Tire*. *See* 423 U.S. at 451; *see Virginia Indonesia Co. v. Harris County Appraisal District*, 910 S.W.2d 905 (Tex. 1995) (under *Michelin*, as under *Richfield Oil*, a state tax imposed directly on exports in transit violates Import-Export Clause), *cert. denied*, 518 U.S. 1004 (1996); *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 821 (5th Cir.) ("To permit each and every state to impose a direct tax on goods in the export stream would circumvent" the objective of ensuring that the federal government "speak[s] with one voice when regulating commercial relations with foreign governments."), *cert. denied*, 498 U.S. 897 (1990).

For much the same reason, the court's Commerce Clause analysis was fundamentally flawed. The court failed to recognize the preemptive effect of federal customs laws, which represent an exercise by the federal government of its commerce power. *Xerox Corp.*, 459 U.S. at 150; *McGoldrick*, 309 U.S. at 428-29. It follows that, on the issue before the court, the Commerce Clause is *not* dormant, and resort to principles applicable in the face of congressional silence is inappropriate. *See Xerox Corp.*, 459 U.S. at 154 ("It is unnecessary for us to consider whether, absent Congressional regulation, the taxes here would pass muster under the Import-Export Clause or the Commerce Clause.").

The impact of applying state law – rather than federal statutory directives – to determine export status for purpose

of constitutional analysis extends far beyond the parties in this case. If, as the Michigan courts ruled, motor fuel sold duty free is not an export, states may seek to use that ruling to assert that sales of all duty-free merchandise are domestic transactions subject to state regulation. The state of Michigan, and in all likelihood other states, can be expected to seize on this decision in seeking to impose their taxes on duty-free merchandise sold within their boundaries.[10] This Court should act now to preempt those efforts.

This case raises an important issue for this Court's review: whether a federal statute that expressly characterizes a product as an export for purposes of federal duties must also control its status for purposes of state taxes. In essence, where Congress has spoken with "one voice" on the character of goods in transit, can the state courts speak with a multiplicity of voices on the same subject? By clarifying the interaction of the Tariff Act of 1930 with the Constitution's foreign trade clauses, this Court can avoid continuing and increasing conflict between state and federal courts.

CONCLUSION

For the reasons stated above, this Court should grant Ammex's petition for a writ of certiorari and reverse the

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[10] In fact, Michigan already has issued notices of intent to assess sales and tobacco products taxes on other duty-free stores operating in Michigan.

decision of the Court of Appeals of Michigan or, in the alternative, remand with instructions to reconsider the constitutional issues under the appropriate federal standards.

Respectfully submitted,

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